



MULTISTATE TAX COMMISSION

STAFF REPORT

Meeting of the Multistate Tax Commission Uniformity Committee

Spokane, Washington

July 28, 2015

10 a.m. Pacific

This report is also available on the MTC website at mtc.gov. Follow the links to the meeting event.

To: Multistate Tax Commission Uniformity Committee
From: Helen Hecht, General Counsel
Subject: Model Sales and Use Tax Nexus (“Engaged in Business”) Statute
Date: July 28, 2015

Introduction

This staff report is provided on behalf of the drafting group which has been working on the Model Sales and Use Tax Nexus (“Engaged in Business”) Statute (see Appendix A). Information on this project is available on the MTC website at MTC.gov. Richard Cram of the Kansas Department of Revenue headed up the drafting group. We would like to thank Richard and all those in the drafting group and on the Uniformity Committee who have worked on this project.

Background

This project began in 2011. The initial goal was to draft a model “click-through” nexus provision patterned after New York’s 2009 law. In 2012, the project was expanded to cover nexus generally. The draft has gone through substantial changes in the last four years. Two drafts have previously been presented to the Uniformity Committee. This year – the drafting group addressed changes recommended by the Committee, conformed the style and wording to the Uniform Law Commission drafting rules, and considered the results of the BNA nexus survey of the states, including the issue of “trailing nexus.”

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(See Appendix B for a listing of the survey questions that the group considered and notes on their discussion of those questions as it pertains to this draft.)

Summary of the Issues for Discussion by the Uniformity Committee

The draft Model Sales and Use Tax Nexus Statute is being referred to the Uniformity Committee for its consideration. To assist the Committee, MTC staff analyzed the underlying assumptions, principles and policies that the draft reflects including a brief examination of any alternatives, evaluated the draft's constitutionality and administrability, and considered the potential need for the model.

Summary of the Important Provisions of the Model

While the model is called the “nexus” model, states generally do not define nexus as part of their sales and use tax statutes. Rather, almost all states impose tax payment or collection obligations on defined persons who engage in defined activities in the state (e.g., “retailers” or “vendors”, and “doing business” or “engaging in business”). Many statutes do this within a “general definitions” section for the particular act or article, while others do so in the imposition statute itself.¹

Most states explicitly or implicitly extend their statutory use tax collection obligations to the limits of what the Constitution allows.

The draft model follows this general approach of defining the operative terms for imposing a collection duty. The draft consists of two main provisions – a definition and a presumption – in Sections (a) and (b) respectively. Section (a) defines the person on whom a tax payment or collection burden is imposed (here, “retailer engaged in business”) as:

¹ A few states legally impose their general transaction tax on the seller rather than the purchaser and may define the term “taxpayer” in that case, rather than retailer or vendor. For discussion, this memo assumes the constitutional limits on sales tax jurisdiction apply to these seller-imposed taxes as well, although that remains a question. See the existing state statutory definitions of related terms at (among others): Ala. Code §40-23-68, Ariz. Rev. Stat. Ann. § 42-5151, Ark. Code Ann. § 26-53-124, Cal. Rev. & Tax. Cd. § 6203, Colo. Rev. Stat. § 39-26-102, Conn. Gen. Stat. § 12-407, D.C. Code Ann. § 47-2201, Fla. Stat. § 212.06, Ga. Code Ann. § 48-8-2, Haw. Rev. Stat. § 238-3, Idaho Code § 63-3611, ILCS § 105/2, Ind. Code § 6-2.5-3-1, Iowa Code § 423.1, Kan. Stat. Ann. § 79-3702, Ky. Rev. Stat. Ann. § 139.010, La. Rev. Stat. Ann. § 47:301, Me. Rev. Stat. Ann. § 1754-B, Md. Code Ann. Tax-Gen. § 11-701, Mass. Gen. L. § 1, Mich. Comp. Laws Ann. § 205.95a, Minn. Stat. § 297A.66 (defining jurisdiction), Miss. Code Ann. § 27-65-9, Mo. Rev. Stat. § 144.010, Neb. Rev. Stat § 77-2701.13, Nev. Rev. Stat. § 80.015 (in the negative), N.J. Rev. Stat. § 54:32B-2, NMSA 1978 § 7-9-10, N.Y. Tax Law § 1101, NC: N.C. Gen. Stat. § 105-164.8, N.D. Cent. Code § 57-40.2-01, Ohio Rev. Code Ann. § 5741.01 (defining nexus), Okla. Stat. § 1401, Pa. Stat. Ann. § 7201, R.I. Gen. Laws § 44-18-15, S.C. Code Ann. § 12-36-1340, S.D. Codified Laws § 10-46-1, Tenn. Code Ann. § 67-6-102, Tex. Tax Code Ann. § 151.107, Utah Code Ann. § 59-12-107, Vt. Stat. Ann. § 9701, Va. Code Ann. § 58.1-612, Wash. Rev. Code § 82.12.040, W. Va. Code § 11-15A-1, Wis. Stat. § 77.51, and Wyo. Stat. § 39-16-101.

a retailer, whether or not authorized to do business in this state, that has a sufficient connection with this state under the United States Constitution to be subject to sales and use tax collection duties

Section (a) also contains a list of activities that would bring a person within the definition of “retailer engaged in business.”

Section (b) is the “click-through” nexus provision modeled on what other states have enacted, generally—which takes the form of a rebuttable presumption. This provision also contains a minimum threshold.

Other provisions of the bill define certain terms and also provide for the possibility that federal legislation might someday grant states authority over other out-of-state persons (i.e. remote sellers).

The workgroup discussed but decided not to include any explicit *de minimis* rule for the activities listed in Section (a) or any “trailing” nexus provision.

General Assumptions, Principles and Policies Reflected and Alternatives:

Staff identified the following assumptions, principles and policies reflected in the model:

1. *Assumption that a “Retailer” is a Seller*
2. *Determination that the Definition Should Be Coextensive with Constitution*
3. *One Purpose of the Statute is to Provide Basic Notice*
4. *That General Rather than Specific Terms Should Be Used*
5. *That Activities Listed Should Be Supported by Existing Authority*
6. *That it is Unnecessary to Set Out an Explicit De Minimis Limitation*
7. *The Draft Should Adopt the Common “Click-Through” Nexus Provision*

Each of these is further evaluated below:

1. Assumption that a “Retailer” is a Seller

The draft does not define “retailer” separately from “retailer engaged in business,” but the way in which the term is used throughout the draft is consistent with the idea that a “retailer” is a seller of that person’s own goods and services. States commonly impose tax collection obligations on sellers because they: (1) collect money from the customer (on whom the tax is generally imposed); (2) maintain records that can be used to report and verify the tax; and (3) have a substantial relationship to the transaction.

But there have always been other persons (*e.g.*, concessionaires and similar intermediaries) who meet these same criteria and upon whom states might reasonably impose a tax collection obligation. Today, that group would include Internet “marketplace” providers used by third-party sellers. Assuming that such

providers meet the three criteria above, it is reasonable to assume that the same constitutional limits would apply to asserting nexus over those providers.

Rather than imposing a tax collection duty on these marketplace providers, however, the draft attributes nexus to a seller using a provider that engages in certain activities in the state. See Section (a)(3). So sellers using a marketplace provider would have the obligation to register, report and remit tax, although nothing would necessarily prevent the provider from doing these things on the sellers' behalf.

It might be easier to simply impose a tax collection obligation directly on the marketplace provider.² It would not be a simple matter, however, to alter the draft model to impose that obligation, nor is it clear that all states would want to do so. But states that do wish to impose a collection obligation on marketplace providers could address this through a separate imposition provision.

States that take that approach will want to address the potential overlap in tax collection obligations. Assuming that whenever the provider has nexus, the seller will also have nexus (because of Section (a)(3), or a similar rule), one way to address the potential overlap is to let sellers designate whether they will remit the tax or have the provider do so (assuming the provider offers that service). Another way would be to require the provider to remit tax, unless the seller certifies that the seller will do so. (An analogous system is used by states to require pass-through entities to collect tax on the nonresident partners' distributive shares—unless the nonresident partner certifies to the state that he will file a return and report the tax due.)

Any provision that would impose an obligation on marketplace providers using the Internet would also need to comply with the Internet Tax Freedom Act's anti-discrimination provision, which is discussed further under "7" below. In general, ITFA requires that sales over the Internet be treated the same (or better) than sales of similar items through other means. Therefore, states should not include only Internet marketplace providers in the group of persons that are subject to tax collection obligations, but should extend the obligation to any type of marketplace provider.

2. Determination that the Definition Should Be Coextensive with the Constitution

There are two important policy reasons for defining "retailer engaged in business" in terms of what the Constitution permits. First, doing so promotes a level playing field among competing vendors. Second, the Constitution provides an overarching test or bar that no set of criteria or list of activities could capture.

² For an example of this, see a proposal introduced in New York this year-- 2015-2016 New York State Executive Budget Revenue Article VII Legislation, Part X, "Revenue (REV) Bill," at 220-225.

But there is also an important policy consideration that mitigates against extending the definition to the constitutional limits—and this is whether doing so is administrable to the extent it sweeps in a number of smaller sellers. (See the discussion in 1 above.) If a state wishes to further limit who is obligated to remit taxes, whether to ensure that the tax is more administrable, or for any other purpose, it would likely be best to do so in a separate statutory provision.

3. One Purpose of the Statute is to Provide Basic Notice

In addition to providing that the term “retailer engaged in business” is defined coextensive with constitutional limits, the model lists particular activities that will give rise to the collection obligation. This was done, in part, to satisfy the requirements of notice that are typically associated with due process jurisdiction and with the imposition of state obligations on out-of-state persons generally. While a general list such as the one included in the model is not likely to encompass all situations where nexus might be found, it provides guidance on a substantial number of circumstances.

The analog for this approach is the typical state long-arm statute. Long-arm statutes often explicitly (or implicitly) extend state adjudicatory jurisdiction to the extent constitutionally allowed, but many also list specific activities that will give rise to jurisdiction as a way to provide notice to out-of-state persons. In applying these so-called “enumerated list” long-arm statutes, courts may take a two-step approach, looking first to see whether the alleged activities of the defendant fall within the activities described in the statute, and then to whether the assertion of jurisdiction comports with due process principles. Alternatively, when the constitutional limits are explicitly invoked, courts often take a one-step constitutional analysis approach.³ We would expect the courts to treat this model imposition statute using a one-step approach, with the only significant difference being that the dormant commerce clause would likely form the primary basis for any analysis of constitutional limitations.

4. General Rather than Specific Terms

The list of activities set out in Section (a) uses general terminology. The BNA nexus survey provides an example of how a statute might use more specific terms, as it solicited responses from the states about their nexus policies in dozens of specific circumstances.⁴ This approach is not only difficult to use in statutory drafting, but it could create unintended consequences. For instance, it might make it more difficult to determine whether nexus is created under situations not explicitly covered by the more specific rules.

³ See Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B.U. L.Rev. 491, 529–30 (2004).

⁴ The survey is available from BNA’s subscription research service; the states’ administrative agencies are generally able to get a copy of the survey without charge from BNA.

The use of general rather than specific terms is also in keeping with the nature of the nexus inquiry, which is often dependent on the particular facts and circumstances of the specific business and the nature of the transactions being conducted. Also, multiple variables may be at issue, such as the nature of the relationship between the seller and a third-party and the nature of the activities conducted by the third-party on the seller's behalf and how those activities are conducted.

Also, it appears that many of the questions posed in the BNA survey were directed at determining where the *de minimis* line might be drawn. This type of inquiry is very dependent on facts and circumstances.

5. That Activities Listed Should Be Supported by Existing Authority

The drafters' discussions of the model's provisions has tended to focus on whether the provisions are supported by existing authority, or a reasonable extension of that authority, including U.S. Supreme Court precedent, holdings of state appellate courts and existing state tax laws. The provisions are not intended to "test the waters." (Nor did the drafters intend that the activities listed act as a limitation on the definition, which is explicitly tied to the constitutional limits.)

It should be noted that in the time during which the model has been under consideration, there have been judicial and legislative developments that may be reflected in the draft's provisions.⁵ One important development, however, that is not reflected in the draft is Justice Kennedy's concurrence in the *DMA* case.⁶ There, Justice Kennedy invited the states to bring the Court a direct challenge to *Quill*. This may be difficult to accomplish without legislative action.⁷

As with other issues discussed above (that is, the extension of tax collection obligations to marketplace providers and any "carve-outs" from constitutional nexus that a state may want to make), creating the basis for a challenge to *Quill* would be better handled in a statutory provision separate from the model here for two important reasons:

⁵ For example, where state legislatures have adopted rules addressing nexus created by third parties or related entities conducting certain activities in the state, the drafters considered these developments as reflecting the legislative determination that such rules are reasonably supported by existing authority.

⁶ *Direct Marketing Association v. Brohl*, — U.S. —, —, 135 S.Ct. 1124, 1134 (2015).

⁷ Some have suggested that states that currently have broadly-drafted imposition statutes could simply change their long-standing interpretation and application of those statutes to impose remittance obligations on any sellers with significant sales in the state, despite a lack of physical presence. An administrative action such as this, however, could be challenged on state law grounds, with or without raising constitutional issues. For example, many states have a judicial doctrine that recognizes the long-standing interpretation of law as being binding in such a way that would limit the administrative ability to vary from that interpretation without action of the legislature. If the state law claim is determinative, no constitutional issue might ultimately be decided and therefore this approach would not create the kind of challenge desired.

- First, while this draft model would presumably take effect when enacted, any legislation precipitating a challenge to *Quill* should provide for that challenge to occur before the related tax collection obligation on “non-nexus” sellers takes effect so as not to implicate past periods or create excessive administrative difficulties.⁸ But normal processes for resolving tax related disputes typically prevent pre-imposition challenges.⁹
- Second, legislation negating *Quill*’s physical presence bar might sweep in a large number of small sellers whose tax liabilities would be minimal, and it might also be harder to persuade a court that any challenge to *Quill* should succeed under the “substantial” nexus standard of the dormant commerce clause doctrine, versus the “minimum contacts” test.¹⁰ So while the draft does not create a threshold standard, legislation designed to precipitate a challenge to *Quill* will need to consider this issue.

The drafters of the model did not discuss what provisions might be needed to raise a *Quill* challenge, but at a minimum, legislators should consider these two issues. An avenue for the pre-imposition challenge could be created so as to allow a facial or declaratory suit to be brought, and even allowing it to be brought directly to the state’s supreme court (assuming this would be permissible under the state constitution). The legislature might also consider a minimum sales threshold or other limiting provision for sellers without physical presence.

6. That it is Unnecessary to Set Out an Explicit *De Minimis* Limitation

The drafters discussed a number of different types of *de minimis* provisions, particularly for Section (a)’s list of activities. Ultimately, they determined not to include a *de minimis* rule, assuming administrators and courts would apply whatever limitation would be reasonable under the circumstances,¹¹ and that the limitations imposed by the Constitution would also apply, so that under the substantial nexus standard, for example, minimum contacts would not suffice.¹²

7. The Draft Should Adopt the Common “Click-Through” Nexus Provision

Since work on the model was begun, there have not only been challenges to click-through nexus provisions but a number of other states have adopted similar

⁸ Many commentators have said that it was the failure in *Quill* to reassure the Court that any change in the physical presence standard would be applied only prospectively that helped tip the balance in favor of retaining that standard.

⁹ Such processes include the inability to mount a declaratory judgment challenge, the need for injury in any suit for injunctive relief and the requirement of administrative exhaustion.

¹⁰ Recently, the Supreme Court in *Wynne* cited *Quill* for the proposition that the dormant commerce clause doctrine imposes different limits than the Due Process Clause, and cited *Complete Auto*, for the proposition that one of these limits is substantial nexus. *Comptroller of Md. v. Wynne*, 135 S. Ct. 1794 (2015).

¹¹ *Wisconsin Dep’t of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231, 112 S.Ct. 2447, 2457, (1992).

¹² See FN 8, *supra*.

provisions. The model adopts the approach used by virtually all states—which employs a rebuttable presumption. That approach was upheld against constitutional challenges in the consolidated *Overstock.com* and *Amazon.com* cases in New York.¹³

The *Performance Marketing Association* case out of Illinois demonstrates the need for states to also consider the Internet Tax Freedom Act when evaluating any click-through nexus provision. ITFA Sec. 1105(2) defines a “discriminatory tax” as:

any tax . . . on electronic commerce that is not generally imposed . . . on transactions involving similar property, goods, services, or information accomplished through other means . . . at the same rate . . . [or lower] . . . [or that] imposes an obligation . . . on a different person or entity than in cases of transactions . . . accomplished through other means . . . [or] any tax . . . if the sole ability to access a site on a remote seller’s out-of-State computer server is considered a factor in determining a remote seller’s tax collection obligation; or a provider of Internet access service or online services is deemed to be the agent of a remote seller for determining tax collection obligations solely as a result of the display of a remote seller’s information or content on the out-of-State computer server of a provider . . . or the processing of orders through the out-of-State computer server of a provider of Internet access service or online services.

The Illinois Supreme Court determined in *Performance Marketing* that the Illinois statute singled out solicitations done through Internet sites, thus violating the anti-discrimination provision of ITFA.¹⁴

Is the Draft Model Constitutional?

There is support in existing authority for both Sections (a) and (b). In addition, other factors virtually ensure that Section (a) would withstand a facial constitutional challenge. First, the operative definition is explicitly made coextensive with constitutional limits and the listed activities should be construed in this context. Second, statutes are generally presumed constitutional.¹⁵ Third, as long as statutes may be construed as constitutional, they will be interpreted in a manner that allows them to be upheld if possible.¹⁶ Fourth, except for some First Amendment challenges, the correct standard for striking down a statute as facially unconstitutional requires a showing that no possible interpretation or

¹³ *Overstock.com, Inc. v. New York State Dep’t of Taxation and Finance*, 20 NY3d 586, 987 NE2d 621, (2013).

¹⁴ *Performance Marketing Ass’n v. Hamer*, 2013 IL 114496, 998 N.E.2d 54 (2013).

¹⁵ *Parsons v. Bedford*, 3 Pet. 433, 448–449, 7 L.Ed. 732 (1830).

¹⁶ *Hooper v. California*, 155 U.S. 648, 657, 15 S.Ct. 207 (1895).

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application of the statute would be constitutional.¹⁷ Fifth, it is almost inconceivable that any state court (where a challenge would have to be brought) would strike the state's tax imposition statute as unconstitutional in whole or in significant part—since this would negate the tax entirely or limit it when applied in situations where it would clearly be constitutional. Moreover, the model has a severability clause that would prevent this.

An as-applied challenge to Section (a) will, obviously, depend on the facts and circumstances. Such a challenge is also likely to be treated similarly to challenges of adjudicatory jurisdiction under state long-arm statutes. As discussed above, courts typically look to see if the defendant's actions fall within the statutory language, but then also perform a separate constitutional analysis. The difference here is that a sales and use tax imposition statute is subject to scrutiny under not just due process, but also *Quill's* dormant commerce clause bar.

Two other issues merit some discussion. The first is the omission of an explicit *de minimis* provision or threshold in Section (a). In general, such a provision is not necessary for a statute to be held to be constitutional, and courts may recognize an implicit *de minimis* exception where one is not specifically included. (See discussion under number 6 above.)

The second issue is how the lack of a “trailing” nexus provision will be treated. There are no instances we are aware of where the lack of a trailing nexus provision (which can be viewed as providing a cut-off, as well as extending nexus for some time) has been used to challenge the constitutionality of an imposition statute. If a state were to impose a tax collection duty on a seller who had ceased its nexus-creating activities in the state, that taxpayer could potentially bring a successful constitutional challenge whether or not the statute includes a trailing nexus provision.

As discussed above, the “click-through” nexus provision in Section (b) follows the general form adopted in other states which was upheld in the *Amazon.com* and *Overstock.com* cases before the New York Court of Appeals two years ago. (See discussion at number 7 above.) Therefore, we expect that the provision would be upheld in the majority of other states.

Is the Draft Model Administrable?

As discussed above at number 1, the draft model may tend to extend the tax collection obligation to a number of relatively small sellers assuming that Section (a)(3) is interpreted so that marketplace providers with presence in a state create nexus for all of their third-party sellers. How Section (a)(3) applies in specific circumstances may vary, depending on the facts, but it would certainly be a reasonable application of that provision to assert nexus over a third-party seller whose marketplace provider otherwise has clear physical presence in the state, and undertakes activities allowing the seller to

¹⁷ *U.S. v. Salerno*, 481 U.S. 739 (1987).

make or maintain a market in that state, especially if those activities result in regular sales.

The fact that the model defines “retailer engaging in business” as coextensive with the constitutional limits, and uses general rather than specific terms when addressing the types of activities that may create a tax collection obligation, means that states will necessarily have to use discretion in applying those provisions to particular situations that may not fit squarely into the listed activities. First, the fact that the activities in question may not fit squarely into the statutory list is not determinative, since the definition is not confined by that list. Second, some concepts, such as whether a third party is acting in such a way as to establish or maintain a market for a seller, are somewhat subjective in nature.

Is There a Need for the Model?

Every state that has a sales and use tax already has some form of an imposition statute in place along with operative definitions.¹⁸ Most, although not all, provide some list of activities that constitute nexus for purposes of being subject to a tax collection duty. It appears most states’ imposition statutes have been interpreted as applying to the limits of what is constitutional. Approximately 15 states now have some form of click-through nexus provision as well. It seems doubtful that states that have imposition statutes similar to but not exactly the same as the model will simply adopt the model. It is perhaps more likely that a state would look at the model as a standard in evaluating their own statutes and definitions, and perhaps adopt the model click-through provision if the state hasn’t done so already.

There is also some doubt as to whether the model, if adopted in total, would create complete uniformity at the edges. That is always the nature of uniform rules that must be applied to real-life situations. It is perhaps more the case with nexus inquiries, which are by nature fact-intensive. And while there is likely to be less uniformity in applying the principles to gray areas, discussions of the drafters and others show that there is substantial agreement among the states generally. Adoption of the model or conforming of state law to the model’s general outlines would likely create consistencies that would benefit taxpayers.

¹⁸ See FN 1, *supra*.

APPENDIX A

**Multistate Tax Commission Draft
“Engaged in Business” Model Statute – Revisions as of July 1, 2015.**

DRAFTER’S NOTES

The following model definition of “retailer engaged in business”/ “engaged in business” is intended to be used in conjunction with the state law provision(s) imposing on particular persons an obligation to pay or to collect and remit sales or use taxes where certain activities are conducted in the state. If the particular state law provision imposing the obligation uses a different term for such persons (e.g. “vendor” or “seller”) or for the activities conducted (e.g. “doing business”), that term can be substituted.

Also note that this model does not address the issue of “trailing nexus”—whether or not the activities that create an obligation to pay or collect and remit tax at a particular point in time will continue to create that obligation after those activities cease. Adopters of the model may therefore wish to consider addressing that issue by, for example, specifying that the obligation continues for the current filing period, or for the current and subsequent filing periods, or for some other time.

Bracketed/italicized text indicates where states will need to insert state-specific language or references.

MODEL ACT

(a) Retailer engaged in business in this state.

“Retailer engaged in business in this state” as used in [this Article or Act imposing tax] means a retailer, whether or not authorized to do business in this state, that has a sufficient connection with this state under the United States Constitution to be subject to sales and use tax collection duties. “Retailer engaged in business in this state” specifically includes a retailer that conducts any of the following activities in this state:

(1) Maintaining or using directly or indirectly, an office, place of distribution, sales or sample room or place, warehouse or storage place, or other place of business, whether through a related party, or agent, by whatever name called.

(2) Having a full or part-time employee acting on behalf of the retailer in this state.

(3) Having a representative, agent, salesperson, independent contractor, or any other person acting or operating under the authority of the retailer or a related party for the purpose of selling, delivering, installing, assembling, maintaining or repairing the retailer’s products, or taking orders for or otherwise establishing or maintaining a market [for tangible personal property and/or taxable services sold by the retailer] in this state.

(4) Owning or leasing real or tangible personal property;

(5) Having a related party acting under an agreement with or in cooperation with the retailer that:

(A) owns or leases real or tangible personal property or performs services in connection with the sale or solicitation of sales of [tangible personal property and/or taxable services] on behalf of the retailer, including services to design and develop tangible personal property sold by the retailer; or

(B) uses trademarks, service marks, or trade names that are the same or substantially similar to those used by the retailer.

(b) Presumption.

(1) A retailer making sales at retail [of tangible personal property and/or taxable services] into this state is presumed to be engaged in business in this state if:

(A) the retailer has an agreement, directly or indirectly, with one or more persons in the state under which, for a commission or other consideration based on completed sales, the person refers potential purchasers to the retailer, directly or indirectly, whether by a link on an internet website, written or oral presentation, or otherwise; and

(B) the cumulative gross receipts from sales by the retailer to purchasers who are referred to the retailer by all persons in this state with such an agreement is greater than \$10,000 during the immediately preceding 12 months.

(2) The presumption created by Subsection (b)(1) may be rebutted by proof that, during the preceding 12 months, no resident in the state with whom the retailer has an agreement engaged in any solicitation in the state on behalf of the retailer that would create a sufficient connection between the retailer and the state under the United States Constitution for the state to impose sales and use tax collection duties. Evidence to rebut the presumption may consist of a verified written statement from each resident with whom the retailer has an agreement, obtained and provided in good faith, that the resident did not engage in any such solicitation or other activities in this state on behalf of the retailer during the preceding 12 months.

(3) An agreement for advertising services with a person or persons in this state, to be delivered on television, radio, in print, on the Internet, or by any similar medium, is not an agreement described in Subsection (b)(1) above, unless the person who is a party to the agreement with the retailer also directly or indirectly solicits potential customers in this state for the retailer through use of flyers, newsletters, telephone calls, electronic mail, blogs, microblogs, social networking sites, or other means of direct or indirect solicitation specifically targeted at potential customers in this state. For purposes of this subsection, an agreement for services compensated for with commissions or other

consideration conditioned upon completed sales in this state is not an agreement for advertising services.

(4) This Subsection (b) shall apply without regard to the date the retailer and the resident entered into the agreement described herein.

(5) The 12 months before the effective date of this Act are included as part of the preceding 12 months for purposes of this Act.

(c) For purposes of this Section, a person is a related party to the retailer if:

(1) the person and the retailer are component members of the same controlled group of corporations under section 1563 of the Internal Revenue Code;

(2) the person is related to the retailer in a manner described under the provisions of section 267 of the Internal Revenue Code; or

(3) the retailer and the person are entities such as a corporation, limited liability company, partnership, estate, or trust, and the shareholders, members, partners, or beneficiaries of one entity own in the aggregate directly, indirectly, beneficially, or constructively at least 50 percent of the profits, capital, stock, or value of the other entity.

(d) If a federal statute authorizes the imposition by this state of a duty to collect sales and use tax on a retailer, then that retailer shall be deemed to be a retailer engaged in business in this state.

(e) The definitions in this Section are applicable only to the taxes levied under [this Article or Act].

(f) The provisions of this Section are severable. If any provision of this Section or its application is held invalid, this shall not affect other provisions or applications that can be given effect without the invalid provision or application.

(g) This statute applies to sales made on or after [effective date].

APPENDIX B

In April 2015, Tax Management/Bloomberg BNA released a special report comprised of a survey of state tax departments. The survey covered a wide range of topics, including nexus. For the nexus portion, the survey presented a number of different scenarios, and asked states to respond whether the activities described were nexus-producing (or non-nexus producing).

If the goal of the Uniformity Committee is to create a comprehensive model nexus statute, the utility of the BNA survey becomes obvious. Staff reviewed the survey, and of the scenarios presented, chose those that, based on the revenue agencies' responses, it believed to be nexus producing. Those scenarios that were already clearly covered by the draft statute and had overwhelming response from the states were left out, as were those that the states generally agreed did not produce nexus.

Below are the survey questions taken directly from the BNA survey, and in most cases, are verbatim. The parentheses after the question contains the number of states that responded that they would assert nexus. The model reference after the question is to the provision that might apply, depending on all facts and circumstances.

1. Remote Sales

a. The corporation sells tangible personal property to residents in your state from outside the state (e.g., by telephone, over the Internet, via catalog/direct mail, or otherwise) and has an employee visit your state four or more times during the year. (Yes – 37) Sec. (a)(2)

b. The corporation sells (...) and uses an employee or third party (e.g., independent contractor, affiliated company, or other representative) to investigate, handle, or resolve customer issues, provide training or technical assistance, or otherwise provide customer service to customers in your state. (Yes – 39) Sec. (a)(3)

c. The corporation sells (...) and delivers merchandise to customers in your state in company-owned vehicles or by means other than common carrier or the U.S. Postal Service. (Yes – 37) Sec. (a)(3)

d. The corporation sells (...) and delivers merchandise to customers in your state in returnable containers. (Yes – 24) Sec. (a)(3)

e. The corporation sells (...) and ships its products for distribution to a third-party distributor located in the state that performs functions such as labeling, packaging, and shipping. (Yes – 27) Sec. (a)(3)

f. The corporation sells (...) and provides in-state telephone or Internet kiosks that allow customers to access inventories and purchase merchandise from remote subsidiaries. (Yes – 33) Sec. (a)(1) and (5)

2. Temporary or Sporadic Presence

a. The corporation sells tangible personal property to residents in your state from outside the state (e.g., by telephone, over the Internet, via catalog/direct mail, or otherwise) and makes sales and/or accepts orders at the trade show. (Yes – 27) Sec. (a)(2)

b. The corporation sells (...) and limits trade show activities in the state to one to five days annually. (Yes – 24) Sec. (a)(2)

c. The corporation sells (...) and sells tangible personal property while temporarily located in your state for up to three days. (Yes – 34) Sec. (a)(2)

d. The corporation sells (...) and has employees or representatives occasionally enter the state to meet with instate suppliers of goods or services. (Yes – 19) Sec. (a)(2)

e. The corporation sells (...) and makes remote sales of tangible personal property to state residents and holds two or more one-day seminars in the state. (Yes – 27) Sec. (a)(2)

f. The corporation sells (...) and makes remote sales of tangible personal property to state residents, holds two or more one-day seminars in the state, and has its employees visit the state five times during the year. (Yes – 32) Sec. (a)(2)

3. Activities of Unrelated Parties

a. The corporation sells tangible personal property to residents in your state from outside the state (e.g., by telephone, over the Internet, via catalog/direct mail, or otherwise) and hires an unaffiliated printer in the state and stores raw materials or finished goods at the in-state printer's plant. (Yes – 24) Sec. (a)(3) and (4)

b. The corporation sells (...) and hires an unrelated call center or fulfillment center located in your state to process telephone and electronic orders that primarily derive from out-of-state customers. (Yes – 27) Sec. (a)(3)

c. The corporation sells (...) and produces an "infomercial" that runs on an in-state television channel and pays commissions to the local TV station based on a percentage of sales to in-state consumers who made purchases using the phone number or website address displayed on the "infomercial." (Yes – 17) Sec. (b)

d. The corporation sells (...) and collects delinquent accounts using a collection agency in your state or hires attorneys, or other third parties, to file collection suits in courts in your state. (Yes – 16) Sec. (a)(3)

e. The corporation sells (...) and stores and ships items from an unrelated distribution center in your state. (Yes – 31) Sec. (a)(4)

4. Financial Activities

a. The corporation sells tangible personal property to residents in your state from outside the state (e.g., by telephone, over the Internet, via catalog/direct mail, or otherwise) and owns an interest in an investment partnership or LLC that has operations in your state. (Yes – 13) (Might not apply.)

b. The corporation sells (...) and owns a general interest in a partnership that is doing business in your state. (Yes – 16) (Depends)

c. The corporation sells (...) and owns an interest in an LLC that is doing business in your state and is involved in managing the LLC. (Yes – 20) (Depends)

5. Activities of In-state Affiliates

a. The corporation is affiliated with an entity that sells tangible personal property or services to customers in your state, and uses the in-state affiliate to accept returns, take orders, perform customer service, or distribute advertising materials on its behalf. (Yes – 36) Sec. (a)(3) and (5)

b. The corporation is affiliated (...) and sells tangible personal property over the Internet or by catalog and has an affiliated company that operates a retail store in your state. (Yes – 23) Sec. (a)(3) and (5)

c. The corporation is affiliated (...) and participates in a loyalty points program with the in-state affiliate, allowing customers to earn points for purchases from the corporation and redeem the points for merchandise at the affiliate's in-state stores. (Yes – 30) Sec. (a)(3) and (5)

d. The corporation sells gift cards in affiliated in-state stores. (Yes – 27) Sec. (a)(3) and (5)

e. The corporation makes remote sales to residents of your state and owns at least 5 percent of an in-state affiliate that shares the corporation's logo. (Yes – 23) Sec. (If "related")

f. The corporation makes remote sales to residents of your state and owns less than 5 percent of an in-state affiliate that shares the corporation's logo. (Yes – 20) (Not "related")

g. The corporation makes remote sales to residents of your state and accepts returned items or exchanges items that were purchased from an affiliate's in-state stores. (Yes – 30) Sec. (a)(3) and (5)

6. Internet Activities

Spokane, Washington

July 28, 2015

a. The corporation makes remote sales of tangible personal property to residents in your state from outside the state via a website and enters into an agreement with a resident of your state in which the corporation pays commissions or fees for referrals to the corporation's website. Assume the annual gross receipts from sales attributable to the arrangements total less than \$10,000. (Yes – 18) No – less than threshold.

b. The corporation is an Internet-based retailer with an out-of-state home office and enters into an agreement with an in-state operator of a website. The website operator hosts advertisements directing consumers to the website of the out-of-state retailer, and is paid when a consumer clicks on the ad and buys a product from the out-of-state retailer (per conversion). (Yes – 16) Sec. (b)

c. The corporation leases space on a third-party's Internet server located in your state. Assume that space on the third-party's server is also leased to several other unrelated corporations. (Yes – 26) Sec. (a)(4)

d. The corporation leases space on a third-party's network of Internet servers, some of which are located in your state. Assume that the corporation's data is on the third-party's Internet server in your state for less than six months during the year. (Yes – 24) Sec. (a)(4)

e. The corporation leases space on a third-party's network of Internet servers, some of which are located in your state. Assume that the corporation's data is on the third-party's Internet server for more than six months during the year. (Yes – 24) Sec. (a)(4)

7. Digital Goods

a. The corporation sells data, such as music files, to residents in your state and the data is stored on a server located in your state. (Yes – 22) Sec. (4) – depends.

b. The corporation makes remote sales of “canned software” to residents in your state and then sends a representative to customize it to meet the customer's specific needs. (Yes – 37) Sec. (a)(3)

8. Distribution and Delivery

a. The corporation makes remote sales into your state and picks up defective products or scrap materials in your state in taxpayer-owned vehicles. (Yes – 35) Sec. (a)(4)

b. The corporation makes remote sales into your state and picks up raw materials in your state in taxpayer-owned vehicles. (Yes – 26) Depends

c. The corporation makes remote sales into your state and “back hauls” (i.e., picks up shipments at the destination or nearby location for delivery to another point) in corporate-owned trucks. (Yes – 27) Depends

9. Third Party Solicitation Activities and Attributional Nexus

a. The corporation makes remote sales into your state and hires a third party to distribute flyers, coupons, and other printed promotional materials. (Yes – 20) Sec. (a)(3)

b. The corporation makes remote sales into your state and hires a third party to negotiate prices to buy. (Yes – 18) Sec. (a)(3)

c. The corporation makes remote sales into your state and hires a third party to negotiate prices to sell. (Yes – 28) Sec. (a)(3)

10. Transactions Involving Franchise Agreements

a. The corporation licenses intangible property to an in-state franchisee and the corporation makes one [or more] inspection visit[s] to the franchisee’s location per year. (One visit – Yes, 24) (2-6 visits – Yes, 25) (6 or more visits – 27) Sec. (a)(2)

b. The corporation licenses intangible property to an in-state franchisee and the corporation leases machinery and equipment worth [at least] \$20,000 to the franchisee. (\$20,000 – Yes, 37) (\$100,000 – Yes, 37) Sec. (a)(2) and (4)

c. The corporation licenses intangible property to an in-state franchisee and the corporation maintains and repairs the franchisee’s equipment in your state. (Yes – 37) Sec. (a)(2) or (3)

11. Service Providers

a. The out-of-state corporation has employees that regularly (e.g., 12 or more times per year) enter the state to deliver to in-state customers tangible personal property that is incidental to the performance of a taxable service. (Yes – 33) Sec. (a)(2)

b. The out-of-state corporation has employees occasionally (e.g., less than 12 times per year) enter the state to deliver to an in-state customer tangible personal property that is incidental to the performance of a taxable service. (Yes – 30) Sec. (a)(2)

c. The out-of-state corporation stores tangible personal property with a third party in the state that is transferred to in-state customers as an incidental part of the performance of a taxable service. (Yes – 31) Sec. (a)(4)

13. Cloud Computing

Spokane, Washington

July 28, 2015

a. The out-of-state corporation sends an employee to your state to perform an initial setup and then charges fees to in-state customers for the right to access non-downloadable prewritten software that is hosted on a server in another state. (Yes – 18) Sec. (a)(2)

b. The out-of-state corporation hires an independent contractor in your state to provide training to in-state customers and charges fees to in-state customers for the right to access non-downloadable prewritten software that is hosted on a server in another state. (Yes – 15) Sec. (a)(3)

c. The out-of-state corporation charges fees to in-state customers for the right to access non-downloadable prewritten software that is hosted on a server in another state and occasionally (e.g., one to 11 times per year) has employees meet with customers in your state. (Yes – 16) Sec. (a)(2)

d. The out-of-state corporation charges fees to in-state customers for the right to access non-downloadable prewritten software that is hosted on a server in another state and regularly (e.g., 12 or more times per year) has employees meet with customers in your state. (Yes – 17) Sec. (a)(2)

e. The out-of-state corporation sends an employee in your state to perform an initial set up and then charges fees to in-state customers for the right to access information on its website that is hosted on a server in another state. (Yes – 14) Sec. (a)(2)

f. The out-of-state corporation hires an independent contractor in your state to provide training to in-state customers for the right to access information on its website that is hosted on a server in another state. (Yes – 12) Sec. (a)(3)

g. The out-of-state corporation charges fees to in-state customers for the right to access information on its website that is hosted on a server in another state and occasionally (e.g., less than 12 times per year) has employees meet with customers in your state. (Yes – 13) Sec. (a)(2)

h. The out-of-state corporation charges fees to in-state customers for the right to access information on its website that is hosted on a server in another state and regularly (e.g., 12 or more times per year) has employees meet with customers in your state. (Yes – 14) Sec. (a)(2)

14. Registration with State Agencies/Departments

a. The out-of-state corporation is registered with the state as a government vendor or contractor. (Yes – 16) Not covered.

15. Drop Shipments

a. The out-of-state corporation is a distributor that uses an in-state manufacturer, who acts as a fulfillment agency in your state to pack and ship orders via common carrier to in-state customers, and (a) the manufacturer holds title to the inventory until the corporation directs the manufacturer to ship the order. (Yes – 21) Sec. (a)(3)

b. The out-of-state corporation is a distributor that uses an in-state manufacturer, who acts as a fulfillment agency in your state to pack and ship orders via common carrier to in-state customers, and (b) the corporation holds title to the inventory until the corporation directs the manufacturer to ship the order. (Yes – 27) Sec. (a)(3)

c. The out-of-state corporation is a distributor that contracts with an in-state manufacturer to perform an order fulfillment service on the corporation's behalf in which the manufacturer accepts phone and mail orders addressed to the corporation, processes payments made payable to the corporation and packages and ships inventory via common carrier to the corporation's customers, and (a) the manufacturer holds title to the inventory prior to shipment. (Yes – 33) Sec. (a)(3)

d. The out-of-state corporation is a distributor that contracts with an in-state manufacturer to perform an order fulfillment service on the corporation's behalf in which the manufacturer accepts phone and mail orders addressed to the corporation, processes payments made payable to the corporation and packages and ships inventory via common carrier to the corporation's customers, and (b) the corporation holds title to the inventory prior to shipment. (Yes – 24) Sec. (a)(3)

e. The out-of-state corporation is a distributor that contracts with an in-state manufacturer to accept and process product returns on the corporation's behalf, including evaluating products for defects, crediting the customer and maintaining the product inventory, and (a) the corporation charges product return inventory back to the manufacturer such that the manufacturer owns the returned inventory. (Yes – 30) Sec. (a)(3)

f. The out-of-state corporation is a distributor that contracts with an in-state manufacturer to accept and process product returns on the corporation's behalf, including evaluating products for defects, crediting the customer and maintaining the product inventory, and (b) the corporation retains ownership of the product return inventory. (Yes – 31) Sec. (a)(3)